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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

DIRECTOR GENERAL OF RAILROADS,
Petitioner.

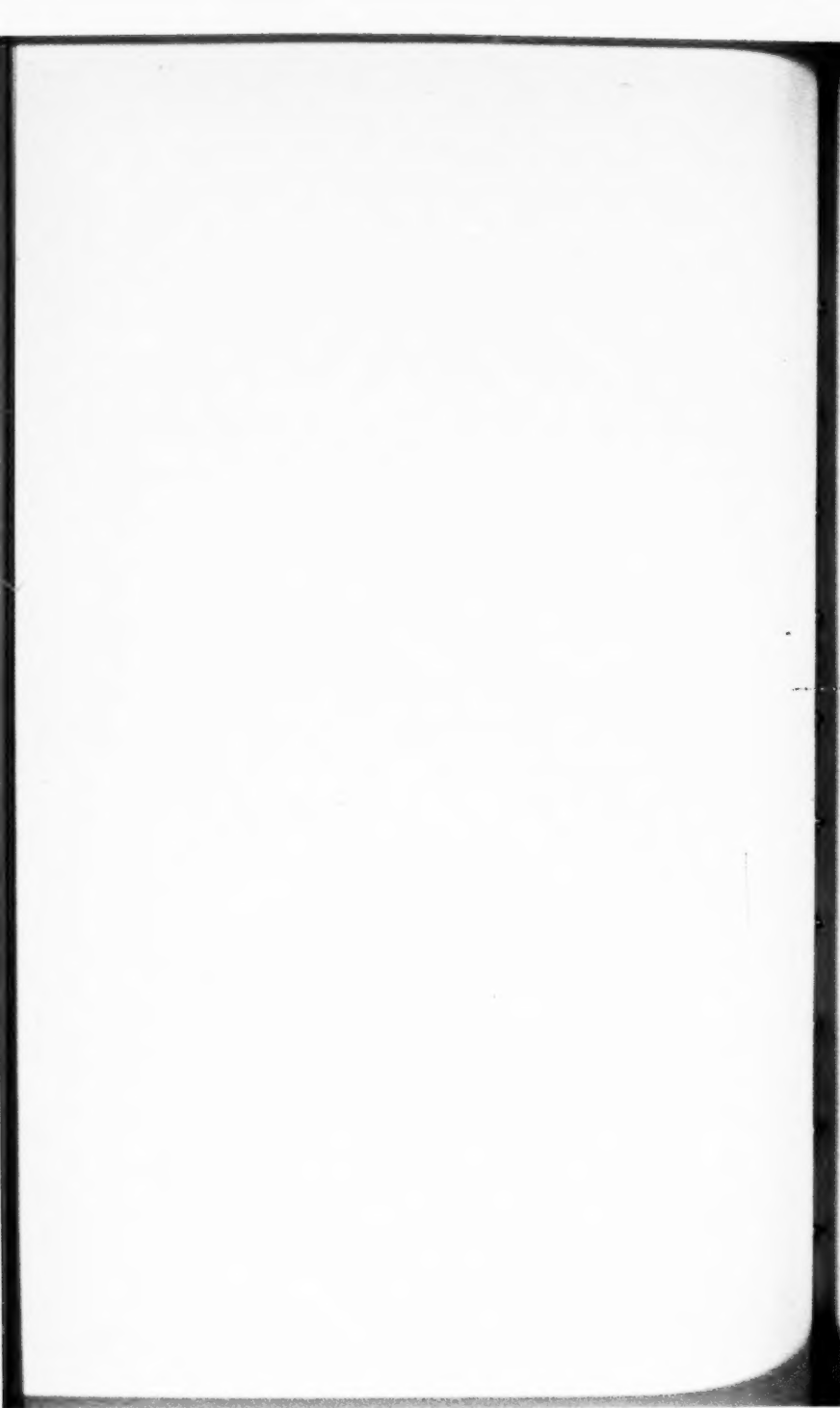
against

SAMUEL KASTENBAUM,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW YORK, AND BRIEF
IN SUPPORT OF PETITION.**

LYMAN M. BASS, ESQ.,
Attorney for Petitioner,
Director General of Railroads.

LYMAN M. BASS, ESQ.,
THOMAS R. WHEELER, ESQ.,
Of Counsel.



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IN THE
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DIRECTOR GENERAL OF
RAILROADS,

Petitioner,

AGAINST

SAMUEL KASTENBAUM,
Respondent.

PETITION FOR WRIT OF CERTIORARI

*To the Honorable .The Supreme Court of the
United States:*

Your petitioner, Director General of Railroads, deeming himself aggrieved by a certain decree or order of the Supreme Court of the State of New York, entered in the case of Samuel Kastenbaum against Director General of Railroads, which decree or order became final for the purposes of review in this court on the 3rd day of February, A. D. 1922, prays this Honorable Court to issue its writ of certiorari as authorized so to do by the provisions of the Act of Congress approved September 6, 1921, (U. S. Revised Statutes, §709) ad-

dressed to the said Supreme Court of the State of New York commanding it to certify and transmit to this court, on a day therein named, a full and complete transcript of the record and all proceedings had in the various courts of the State of New York in said cause, in so far as the same appear of record or on file in said Supreme Court of the State of New York, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that petitioner may have such relief and remedy in the premises as this Court may deem appropriate, and justice and right may require.

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The matters involved and the facts and circumstances are as follows:

1. The respondent, Samuel Kastenbaum, on or about the 17th day of August, 1918, commenced this action by the service of a summons and complaint upon the Lehigh Valley Railroad Company (fol. 16-51). Thereafter and on or about the 3rd day of May, 1920, an amended complaint in which the Director General of Railroads was named as defendant was served upon the attorneys for the defendant. (Fol. 72-107). The plaintiff alleged in the amended complaint that during the period of federal control of the railroads (Fol. 78-79) the plaintiff was arrested by an agent of the defendant and that the arrest was false, wanton, malicious and without probable cause (fol. 85) and

further alleged that upon a hearing in the City Court of Buffalo, he was discharged. Fol. 97-98.

2. The complaint stated causes of action both for malicious prosecution and for false arrest. The cause of action for malicious prosecution was dismissed by the Trial Court at the close of the plaintiff's case. (Fol. 287) The defendant's motion to dismiss the cause of action for false arrest was denied by the Trial Court (fol 289) and likewise a motion to dismiss the plaintiff's complaint at the close of the entire case was also denied. (Fol. 619) while the complaint charged the filing of an information upon which the respondent was arrested (fol. 79-83), the undisputed evidence was that no warrant had been issued at the time the respondent was taken in custody. Fol. 577-578, 178-179) The action was treated by the court and counsel as an action for false arrest.

3. A charge of grand larceny, third degree, was laid against the respondent on the ground that he had stolen and taken away a quantity of butter valued at One thousand Dollars, contained in a freight car of the Lehigh Valley Railroad, and it was further alleged that the property had been appropriated to the use of respondent. (Fol. 80-83).

4. The Director General of Railroads contended *inter alia* in the lower court that his agent was justified in making the arrest in that he had probable cause to believe that the respondent had com-

mitted the crime. No such question as that is before this Court. The single question involved upon this application for a writ of certiori and upon the appeal is the question whether an action of this character is maintainable against the Director General of Railroads, which point was preserved by an appropriate exception upon the trial.

5. On the trial of the action on the 11th day of October, 1920, before the Hon. Alonzo G. Hinkley and a jury, the Trial Court(over this petitioner's objection and exception) refused to dismiss the complaint, and judgment was rendered against the defendant in the sum of Five hundred Dollars. (Fol. 140-143)

6. From the judgment entered on this verdict and the order denying a new trial, this petitioner appealed to the Appellate Division of the Supreme Court. Fourth Department, of the State of New York, which court unanimously affirmed the judgment appealed from. (Fol. 680-698). Thereafter this petitioner applied for a re-argument of the appeal and such reargument was granted. (Fol. 700-706). Thereafter, the Appellate Division after having heard the re-argument, ordered an affirmance of the judgment of the lower court. (Fol. 712-722). This petitioner thereafter applied to the said Appellate Division for leave to appeal to the Court of Appeals of the State of New York, but such application was denied by the Appellate Division. (Fol. 724-731). Thereafter this petitioner applied to the Court of Appeals for leave

to appeal to that court, but such application was denied by the Court of Appeals. (Fol. 736-739).

II.

The single question and proposition involved in this appeal is substantially as follows:

1. Does an action for false arrest lie against petitioner, an officer of the United States Government, and is such a cause of action included within the provisions of section 10 of the Act providing for the Federal Control of Carriers? (40 United States Statutes 451, Chap. 25, Act of Mch 21, 1918)

The petitioner upon its motion for the direction of a verdict moved for a dismissal upon the ground that the plaintiff had failed to make out a cause of action and specifically argued the particular question herein submitted in the Appellate Division and before the Court of Appeals.

III.

Your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons, among others:

1. Because it was error for the courts of the State of New York to hold that a cause of action for false arrest is maintainable against the Director General of Railroads, an officer of the United States Government.

2. Because this Court has recently held that in an action of a similar nature such a cause of action does not lie. (*Missouri Pacific R. R. Co. vs. Ault*, Adv. Sheets, U. S. Supreme Court, July 1, 1921, P. 647, 256 U. S. 41 S. C. R. 593) Reference is hereinafter made to this case in the brief attached to this petition.

IV.

That the judgment of affirmance complained of was entered in the Erie County Clerk's office on the 12th day of July, 1921 (fol. 697) and became final thereafter by the order of the Court of Appeals denying the application of petitioner for leave to appeal to that court, entered on the 3rd day of February, 1922;

That your petitioner, as required by law, has exhausted every possibility of redress before filing an application for the granting or issuance of a writ of certiorari herein and being without other means for the redress of his grievances, the petitioner presents his petition for a writ of certiorari accompanied by a complete and fully certified transcript of the entire record of all proceedings had in this cause, together with a brief of his argument upon the questions of law involved.

WHEREFORE, Your petitioner respectfully prays that this Honorable Court grant a writ of certiorari in this case to the Supreme Court of the State of New York and cause the record in this

case to be brought to this Honorable Court for final review and determination.

DIRECTOR GENERAL OF RAILROADS,

By LYMAN M. BASS,
Attorney for Petitioner,
Director General of Railroads.

LYMAN M. BASS, Esq.,
THOMAS R. WHEELER, Esq.,
 of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

DIRECTOR GENERAL OF RAILROADS, <i>Petitioner,</i>	} No.
AGAINST	
SAMUEL KASTENBAUM, <i>Respondent.</i>	

**BRIEF IN SUPPORT OF PETITION FOR
 WRIT OF CERTIORARI**

STATEMENT OF FACTS.

The essential facts involved upon this application have been referred to in the petition. Samuel Kastenbaum was arrested by an Agent of the Director General of Railroads and was charged with the crimes of burglary and larceny. No warrant had been issued for his arrest. Upon the hearing in the City Court of Buffalo, he was discharged. (Fol. 184-185). The Director General of Railroads believed that he was justified in making the arrest on account of the facts involved but since the only question before this court is in regard to the right to institute an action of this sort against an officer of the United States Government, it is unnecessary to review the facts at this time.

The complaint charged the filing of an information upon which Kastenbaum was arrested (fol. 78.83), but the undisputed evidence was that no warrant had been issued at the time Kastenbaum was taken into custody. (Fols. 577, 578. Fols. 178, 179). The cause of action asserted by the plaintiff for malicious prosecution was dismissed by the Trial Court at the close of plaintiffs case. (Fol. 287) The defendant's motion to dismiss the cause of action for false arrest was denied by the Trial Court. (Fol. 289) The action as submitted to the jury was treated by the court and counsel as an action for false arrest, and application for this writ is made upon the theory that an action of such a character will not lie.

POINT I.

The Courts of the State of New York erroneously held that an action for false arrest would lie against the Director General of Railroads an officer of the United States; such a cause of action is not included within the provisions of Section 10 of the Act providing for the federal control of carriers.

The complaint alleges two causes of action, one for malicious prosecution and one for false arrest. It is true that at the close of plaintiff's case, the cause of action for malicious prosecution was dismissed. (Fols. 284, 289) The trial Court, however, submitted the cause of action for false ar-

rest to the jury (fols. 620-627) notwithstanding the motion made by the counsel for defendant at the close of the plaintiff's case and at the close of the whole case for a dismissal.

After the first argument of this case in the Appellate Division, and on the first of June, 1921, the United States Supreme Court handed down its decision in the case of *Missouri Pacific R. Co. v. Ault*. This is reported in the Advance Sheets, United States Supreme Court, July 1, 1921, at page 647. In the *Ault* case both the railroad corporation and the Director General of Railroads were sued for a penalty under a statute of the State of Arkansas for non-payment of the wages of an employee within a certain period of days after his discharge. The judgment against the corporation was dismissed upon the ground that after the assumption of federal control of the carrier the railroad corporation could not be held responsible for any acts of the employees of the road. In considering the question of the liability of the Director General the Supreme Court, in its opinion at page 651, said:

“The contention that the Director General, being the carrier, is liable for the penalty imposed by the Arkansas statute, is rested specifically upon the clause in §10, to the effect that the carriers ‘shall be subject to all laws and liabilities as common carriers whether arising under state or Federal laws or at common law’ and the provisions in §15 that the ‘lawful police regulations of the sev-

eral states' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, state and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States, *arising out of the operation of the railroad*, were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the government for a penalty, if it should fail to perform the legal obligations imposed."

(Italics are ours.)

Judgment for the plaintiff was reversed.

In the case of *Pearl Dougherty v. Payne as Director General of Railroads*, decided by the United States District Court in the Southern District of Florida, the opinion of Judge Call reads as follows

"This cause comes on for hearing upon the motion for leave to file an amended declaration.

Heretofore on May 27th, inst., a demurrer was sustained to the declaration.

The 5th ground of the demurrer raised the question whether an action for malicious prosecution could be brought against the Director General of Railroads, as such officer, for the actions of one of the employees of a

railroad system under his control. A careful study of the Acts of Congress covering the Governmental control of transportation system seems to me to answer this question in the negative. Such being my view no purpose would be served in granting the motion to amend and it will therefore be denied."

This decision was handed down June 9, 1921, and, as we are informed, the action was brought for the malicious prosecution of a linen counter employed by the Pullman Car Lines at Jacksonville, Fla., her arrest was procured at the instance of employees of the Pullman lines. She was acquitted by a jury and brought suit for malicious prosecution.

In the case of *Hines vs. Bowling*, 272 Fed. Rep. 230, suit was instituted to recover for damages for malicious prosecution. The question involved in this case was referred to by Judge Boyd in his opinion, but was not passed upon. Judge Boyd stated:

"The question which arises is whether or not, under such circumstances, malice or wrongful motive can be imputed to the Chief Executive, who was performing an official function, or to the Director General, his alter ego, and made the ground of damages at the instance of an individual in a suit against the latter. However, this proposition was not relied upon, nor argued by defendant's counsel, and we do not deem it necessary to pass upon it in order to dispose of the case."

In *State vs. Hines*, Agent, 228 S. W. Rep. 667, the Court of Civil Appeals of Texas held that an action for penalties did not lie against the Director General of Railroads for failure to keep well lighted the water-closets and adjacent depot grounds maintained at several passenger stations of a Railroad taken over by the Director General of Railroads. The statutes of the State of Texas imposed a penalty for failure to keep these places lighted.

We respectfully submit the principle of these decisions applies to this case. It is true that the action as submitted to the jury was one for false arrest and not for malicious prosecution. It is likewise true that the action is not strictly one for a fine nor for a penalty. Nevertheless, those actions which are authorized to be brought against the Director General are defined expressly in Section 10 of the Federal Control Act as follows:

“That carriers while under Federal control shall be subject to all loss and liabilities *as common carriers*, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President.”

It is apparent that the liability created against the Director General is a liability *as a common Carrier*, peculiar to common carriers, and very clearly it was intended to cover actions for personal injuries for negligence. The Director General is an officer of the United States. The Sov-

ereign Government, by the act, consents to suits being instituted against it in certain definite classes of cases. It cannot be thought that the Sovereign Government would consent to be sued in a class of cases such as actions for malicious prosecution or false arrest, where there was an element of moral wrong upon its part.

False arrest or false imprisonment, has been defined as follows in Addison on Torts, page 552;

“False imprisonment has been well defined to be a trespass committed by one man against the person of another by *unlawfully* arresting him and detaining him without any legal authority.”

In *New York P. & N. R. Co. v. Waldron*, (82 Atl. 709) the action was defined as follows:

“‘False imprisonment’ is a wrong akin to that of assault and battery, and consists of imposing, by force or threats, unlawful restraint on a person’s freedom of locomotion. It is the unlawful detention of a person against his will.”

In *Schultz v. Greenwood Cemetery*, (190 N. Y. 776), the Court of Appeals said, referring to an action for false arrest:

“The action is in the nature of a trespass for a direct wrong or illegal act, in which the officer and defendant must have personally participated by direct act or indirect procurement.”

We respectfully submit that within the authority of the *Ault* case, hereinafter set forth, it will not be presumed that the Government of the United States consented by the Federal Control Act to be sued in actions embracing an element of wrong or illegality upon the part of the Sovereign.

FINALLY

Your Petitioner urges:

1. That the Courts of the State of New York have erred in their decision holding that a cause of action for false arrest lies against petitioner, and
2. That the questions submitted were sufficiently raised on the trial in the courts below, and
3. That the decision of this Honorable Court in the *Ault* case supports your petitioner's contention.

WHEREFORE, it is respectfully submitted that a writ of certiorari should be issued as prayed for and that the errors complained of should be corrected by reversing the present order and judgment of the Supreme Court of the State of New York.

LYMAN M. BASS,

Attorney for Petitioner.
Director General of Railroads.

LYMAN M. BASS, Esq.,
THOMAS R. WHEELER, Esq.,
Of Counsel.

To

HOLENDER & HOLENDER,
Attorneys for Respondent,
Buffalo, N. Y.

PLEASE TAKE NOTICE that the foregoing petition for a writ of certiorari and brief in support thereof will be submitted to the Supreme Court of the United States on Monday, May 1, 1922, at 12 o'clock noon, or as soon thereafter as counsel can be heard.

LYMAN M. BASS,
Attorney for Petitioner,
Director General of Railroads.

LYMAN M. BASS, Esq.,
THOMAS R. WHEELER, Esq.,
Of Counsel.

Service of a copy of the above notice, petition and brief is acknowledged this day of April, 1922.

Attorney for Respondent.

No. 94237

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

DIRECTOR GENERAL OF RAILROADS,
Petitioner.

against

SAMUEL KASTENBAUM,
Respondent.

MEMORANDUM IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW YORK

Clark H. Hammond

~~HOLENDER & HOLENDER,~~
Attorneys for Respondent,
Buffalo, N. Y.

ISRAEL G. HOLENDER,
Of Counsel.

Office Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

DIRECTOR GENERAL OF
RAILROADS,

Petitioner,

against

SAMUEL KASTENBAUM,

Respondent.

STATEMENT

On January 23, 1918, respondent was arrested, by the agents of the Lehigh Valley Railroad Company, and charged with pilfering a freight car. He was exonerated at a preliminary hearing. A Supreme Court jury verdict of five hundred dollars, in favor of respondent and against the Director General, as damages for the unwarranted arrest, was unanimously affirmed by the Appellate Division on July 1, 1921.

Appellant's motion for a reargument of the appeal was granted by said Appellate Division on Oct. 5, 1921.

The reargument was heard on November 17, 1921, and on November 30, 1921, said Appellate Division again unanimously affirmed the judgment of the trial court and the order denying a new trial.

Appellant applied to said Appellate Division for leave to appeal to the Court of Appeals and on January 3, 1922, defendants motion was denied, all judges concurring.

Thereafter petitioner applied to the Court of Appeals for leave to appeal to that court, but such application was denied by the Court of Appeals.

POINT I

Section 10 of the Federal Control Act provides that No Defense shall be made upon the ground that the carrier is an instrumentality or agency of the Federal Government. It was not intended by this legislation either to extinguish or impair vested rights of action or to authorize the President or his agents so to do.

Respondent was arrested January 23, 1918.

The false arrest action was instituted on August 17, 1918.

The "Lehigh Valley Railroad Company" was named as defendant.

An answer was interposed on behalf of the company, which alleged, in part, as follows:

"That heretofore the said Director General of Railroads issued a general order known as Order No. 50, which was dated October 28,

1918, and which provided, among other things, that actions at law arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads should be brought against William G. McAdoo, Director General of Railroads, and not otherwise; and further providing that pleadings in all actions of law pending at the time said order was issued against any carrier company for a cause of action arising since December 31, 1917, based on a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the said Director General of Railroads for the carrier company as party defendant, and dismissing the company therefrom, to all the provisions of which said order No. 50 reference hereby is made as though set forth in full.

"That thereafter said order No. 50 was amended by general order No. 50-A, which said order contained the same provisions as order 50 hereinabove referred to, but directed that hereafter actions of the character hereinabove referred to should be brought against "Director General of Railroads" and not otherwise, reference to said order No. 50-A being hereby made as though herein set in full."

Respondent, thereafter, served an amended complaint, substituting the "Director General of Railroads," as defendant, in place and stead of the "Lehigh Valley Railroad Company."

An answer to the amended complaint was then interposed on behalf of the Director General.

Act of March 21, 1918 (Federal Control Act) Chapter 25, Sec. 10, reads, in part, as follows:

"Carriers while under Federal Control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; *and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.*"

In *Moore & Co. v. A. T. & S. F. R. Co.*, 106 Misc. 59, the head note, reads, in part, as follows:

"The provision of section 10 of said act of Congress, which declares that 'Carriers while under Federal control shall be subject to all laws and liabilities as common carriers * * * except in so far as may be inconsistent with

the provisions of this Act or any other Act applicable to such Federal control or with any order of the President', must be construed to be wholly prospective in its operation and to affect only liabilities arising after said act took effect; it was not intended by this legislation either to extinguish or impair vested rights of action or to authorize the President or his agent or agents so to do."

POINT II

A false arrest action is clearly within the purview of the provisions of Section 10 of the Federal Act.

Appellant's memorandum, in support of the motion for a reargument in the Appellate Division, reads, in part, as follows: (pp. 9-10):

"It is apparent that the liability created against the Director General is a liability as a common carrier, peculiar to common carriers, and very clearly it was intended to cover actions for personal injuries for negligence."

General Order 50, issued by the Director General of Railroads, October 28, 1918, provided, in part, as follows:

"It is therefore ordered that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based

on contract, binding upon the Director General of Railroads, claim for death or *injury to person*, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding but for Federal Control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, *that this order shall not apply to actions, suits or proceeding for the recovery of fines, penalties, and forfeitures.*"

The provisions of the foregoing order specifically allow an action to be brought for "injury to person."

"A personal injury" includes * * * an assault, battery, *false imprisonment* * * * "

N. Y. Code of Civil Pro. Sec. 3343, s-d 9).

The *Ault* case, cited by appellant, pertains to fines and penalties, and is not applicable to actions for the recovery of compensation.

The opinion of the Court, in the *Ault* case, reads, in part, as follows:

"The government undertook, as carrier, to observe all existing laws; it undertook to compensate any person injured through a departure of its agents or servants from their

duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties, or to permit any other sovereignty to punish it. . . .

"The purpose for which the government permitted itself to be sued was for compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order: 'Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.' Wherever the law permitted compensatory damages, they may be collected against the carrier, while under Federal Control."

Fiero on Torts, under the head of "Compensatory Damages", states:

"Indemnity may be given for injury to reputation, feelings health, mind, and person, caused by the arrest, together with the expenses of the defense."

The verdict in this case was rendered to compensate respondent for the loss of time, legal expenses, etc., occasioned by his unwarranted arrest.

POINT III

The petition for a writ of certiorari should be dismissed, and the order and judgment of the Supreme Court of the State of New York affirmed.

Respectfully submitted,

Clark H. Hammond
~~HOLENDER & HOLENDER,~~

Attorney for Respondent,

Office and P. O. Address,

738 Prudential Bldg.,

ISRAEL G. HOLENDER,

Buffalo, N. Y.

of Counsel.

Service of a copy the within memorandum is
acknowledged this day of April, 1922.

Attorney for Petitioner.